Attorneys General of California, New York, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Jersey, Oregon, Pennsylvania, Rhode Island, Washington, and Vermont

January 25, 2021

<u>Via Federal eRulemaking Portal and Email</u>
Michael Kuppersmith
Office of Chief Counsel
United States Department of Transportation
National Highway Traffic Safety Administration
1200 New Jersey Ave., SE
Washington, DC 20590

Re: Comments on Civil Penalties Interim Final Rule
Docket No. NHTSA–2021–0001

Dear Counsel Kuppersmith:

The undersigned Attorneys General submit these comments in response to the National Highway Traffic Safety Administration's (NHTSA) request for comments on its Interim Final Rule, 86 Fed. Reg. 3016 (January 14, 2021) (Interim Final Rule). The Interim Final Rule purports to repeal, for certain light-duty vehicle model years, the Congressionally-mandated inflation adjustment that NHTSA made in 2016, when it raised the penalty paid by automakers that fail to meet the applicable Corporate Average Fuel Economy (CAFE) standard from $5.50, the rate that had been in effect since 1997, to $14 per unit of non-compliance. The Interim Final Rule seeks to repeal this adjustment and restore the obsolete $5.50 penalty rate for model years 2019–2021. This action represents the third time that NHTSA has flouted its statutory obligations to raise the long-stagnant CAFE penalty, and to do so by July 2016. NHTSA's earlier actions were vacated by the U.S. Court of Appeals for the Second Circuit, which *twice* confirmed that the inflation-adjusted $14 penalty is "in force" beginning with model year 2019. Nonetheless, in the waning days of the prior administration, NHTSA again defied Congress by rushing out this rule, which purports to repeal the increase for these three model years.

Like NHTSA's two prior rules, the Interim Final Rule is legally, factually, and procedurally flawed. First, NHTSA lacked any express or implied statutory authority to repeal the penalty increase for model years 2019–2021. Indeed, NHTSA's action directly violates the mandatory deadline Congress established when it enacted the Federal Civil Penalties Inflation Adjustment Act Improvements Act, Pub. L. No. 114-74, § 701, 129 Stat. 584, 599 (2015) (Improvements Act). As the U.S. Court of Appeals for the Second Circuit stated when it vacated NHTSA's attempt to indefinitely suspend the penalty increase, the Act's deadlines allow "no discretion to the agencies regarding the timing of the adjustments." *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 109, 113 n.12 (2d Cir. 2018) (*NRDC*). Thus, NHTSA's attempt to once again delay the application of the $14 penalty is unlawful.

Second, NHTSA's purported justifications for the rule are factually unsound. NHTSA alleges that repealing the $14 penalty is necessary to align with automakers' supposed expectations that the outdated $5.50 penalty would still be applied to model years 2019–2021, but any such reliance was patently unreasonable. Automakers have known since at least July 2016 that these model years would be subject to a $14 penalty rate, a fact the Second Circuit confirmed twice. And NHTSA's claim that the economic impact inflicted on the automobile industry by the COVID-19 pandemic justifies repeal of the penalty increase disregards data showing a substantial industry rebound in late 2020, and also overlooks when penalties for model years 2019–2021 will be assessed, finalized, and paid.

Finally, the Interim Final Rule violated the Administrative Procedure Act. NHTSA published this final rule and made the repeal effective immediately without notice and comment. NHTSA did the same in July 2017, when it tried to indefinitely suspend the penalty increase. In that case, the Second Circuit rejected the agency's attempt to claim it had "good cause" to forgo the Administrative Procedure Act's requirements. NHTSA's new "good cause" claims are equally flawed.

Each time NHTSA has tried to delay or roll back the 2016 penalty increase, the agency has focused entirely on the alleged economic impact the increase will have on automakers that violate the CAFE standards. But Congress knew when it enacted the Improvements Act that this would be one of the results. Congress expressly sought to "maintain the deterrent effect of civil monetary penalties and promote compliance with the law; and … improve the collection by the Federal Government of civil monetary penalties." 28 U.S.C. § 2461 note § 2(b). NHTSA has consistently ignored these statutory purposes. To the extent the agency has any discretion in determining when to apply the inflation adjustment (and it plainly does not), the Interim Final Rule had to account for these goals. But by delaying the application of the 2016 penalty increase to model year 2022, the Interim Final Rule would reward non-compliant automakers, punish compliant ones, and substantially reduce the penalties NHTSA expects to collect, *see* 86 Fed. Reg. at 3023, thereby undermining the Act's statutory purposes.

And although the Improvements Act clearly governs here, the Interim Final Rule also conflicts with the energy conservation objectives of the Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 (1975) (EPCA). For over four years, automakers have known that the $14 penalty rate would be applied beginning with model year 2019, and they have had ample time to adjust their planning to account for the higher penalty. EPCA's provisions do not authorize NHTSA to retroactively grant a windfall to any automakers that, ignoring the coming penalty increase, made the business decision to put non-complying fleets—composed of less fuel-efficient vehicles that demand more oil, cost consumers more money at the pump, and emit more harmful pollutants—on the Nation's roads.

For these reasons, and as explained in more detail below, the Interim Final Rule is substantively and procedurally improper and factually unjustified. NHTSA should immediately rescind it and restore the inflation-adjusted $14 penalty rate for model years 2019–2021, as Congress mandated. Review and rescission of the Interim Final Rule is also required by President Biden's Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis (Jan. 20, 2021).

Statutory Background

Congress Established the CAFE Program to Promote Energy Conservation

In the immediate wake of the 1973–74 oil crisis, Congress enacted EPCA, which created a suite of national programs for energy regulation and conservation. Title III of EPCA (now codified at 49 U.S.C. § 32901, *et seq.*) established the CAFE standards for motor vehicles and directed the Secretary of Transportation to adopt regulations to implement these standards, a responsibility the Secretary has delegated to NHTSA. The CAFE standard for passenger cars was initially set at 18 miles per gallon (mpg) in 1978 and has increased intermittently during the past five decades. *See* NHTSA, Summary of Fuel Economy Performance at 2 (2014).[1] Pursuant to the 2007 Energy Independence and Security Act, Pub. L. 110-140, 121 Stat. 1492 (2007) (EISA), which amended EPCA, the CAFE standards for passenger cars have increased to almost 40 mpg for model year 2017 and are set to increase further.[2] The standards for light trucks have followed a similar trajectory. In addition to promoting energy conservation by reducing gasoline consumption, this increase in fuel economy has saved consumers money in reduced fuel costs and lowered the emission of harmful pollutants.

To enforce compliance, EPCA imposes a civil penalty on automakers that violate the CAFE standards. 49 U.S.C. § 32912(b). Congress initially set the penalty rate at $5, to be multiplied by "each tenth of a mpg that a manufacturer's average fuel economy falls short of the standard for a given model year multiplied by the total volume of those vehicles in the affected fleet." *Id.* In 1978, Congress authorized NHTSA to prescribe a higher penalty rate by regulation, contingent on the agency making certain findings and complying with detailed procedures. Pub. L. No. 95–619, § 402, 92 Stat. 3206, 3255 (1978), now codified at 49 U.S.C. § 32912(c). NHTSA has never exercised its discretionary authority under this provision.

Automakers may earn compliance credits by exceeding the CAFE standards for a particular model year. 49 U.S.C. § 32903(a). These credits can then be applied to reduce a shortfall in the automaker's CAFE performance. *Id.* § 32912(b)(3). Credits may be applied across an automaker's fleets, and also may be applied across different years. Thus, a manufacturer may apply credits it obtained from over-compliance during the previous five years, or credits that it anticipates earning based on planned over-compliance in the upcoming three years. *Id.* § 32903(a). Since the enactment of EISA in 2007, automakers have also been permitted to trade credits. *See* 49 U.S.C. § 32903(f).

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[1] Available at https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/performance-summary-report-12152014-v2.pdf.

[2] Information about automakers' recent CAFE performance is available at https://one.nhtsa.gov/cafe_pic/CAFE_PIC_fleet_LIVE.html.

Congress Enacted the Inflation Adjustment Act and Directed Federal Agencies to Increase Their Civil Monetary Penalties to Counter the Effects of Inflation

For over thirty years, Congress has taken steps to counter the erosive effects of inflation on the federal government's civil monetary penalties. In 1990, Congress passed the Federal Civil Penalties Inflation Adjustment Act (Inflation Adjustment Act or Act), in which Congress found that "the impact of many civil monetary penalties has been and is diminished due to the effect of inflation," and that "by reducing the impact of civil monetary penalties, inflation has weakened the deterrent effect of such penalties." Pub. L. 101-410, § 2(a), 104 Stat. 890 (1990) (current version at 28 U.S.C. § 2461 note § 2(a)). To counter this, Congress sought to "establish a mechanism that shall (1) allow for regular adjustment for inflation of civil monetary penalties; (2) maintain the deterrent effect of civil monetary penalties and promote compliance with the law; and (3) improve the collection by the Federal Government of civil monetary penalties." 28 U.S.C. § 2461 note § 2(b).

As a first step, the Act required the Executive Branch to submit a report to Congress identifying each civil monetary penalty as defined under the Act, and the amount each penalty would need to be adjusted to account for inflation. Pub. L. 101-410, § 4. In 1996, Congress took the next step and amended the Inflation Adjustment Act to require agencies to "adjust each civil monetary penalty" for inflation, capped at 10% of the penalty's amount, and make subsequent inflation adjustments at least once every four years. Debt Collection Improvement Act of 1996, Pub. L. 104-134, § 31001, 110 Stat. 1321, 1321-373 (1996). Congress expressly exempted penalties under certain statutes from these inflation adjustments, but did not include EPCA in that list of exemptions. *Id.* Recognizing that this Congressional command applied to the CAFE penalty, NHTSA published a rule increasing the penalty from $5 to $5.50, the maximum adjustment permitted. 62 Fed. Reg. 5,167, 5,168 (Feb. 4, 1997). The CAFE penalty rate would remain at $5.50 for nearly twenty years.

Congress Enacted the 2015 Improvements Act to Strengthen its Command to Agencies to Adjust Outdated Penalties

Despite Congress's objective to "maintain the deterrent effect" of federal civil penalties through "regular adjustment[s] for inflation," 28 U.S.C. § 2461 note § 2(b), several government reports that reviewed the effectiveness of the 1996 amendments concluded that certain features—such as the 10% cap on adjustments and the rounding methodology—prevented many civil penalties from receiving appropriate inflation adjustments. These reports repeatedly cited the CAFE penalty as one of the civil monetary penalties that had stagnated, could not be properly adjusted, and warranted further Congressional action.[3]

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[3] *See* Government Accountability Office (GAO), Civil Penalties: Agencies Unable to Fully Adjust Penalties for Inflation Under Current Law, GAO-03-409, at 29 (Mar. 14, 2003) (explaining how rounding rule in 1996 amendments interfered with NHTSA's ability to adjust CAFE penalty to address inflation); GAO, Vehicle Fuel Economy: Reforming Fuel Economy Standards Could Help Reduce Oil Consumption by Cars and Light Trucks, and Other Options

Congress responded to these recommendations in 2015 by enacting the Improvements Act. This legislation "made several key changes" to the Inflation Adjustment Act that reflected Congress's "renewed effort to tackle the recurring issue of stagnant civil monetary penalties." *NRDC*, 894 F.3d at 111. Among other things, the Improvements Act "removed the ten percent cap on penalties, deleted the rounding methodology that had kept penalties stagnant, and set firm dates by which agencies were required to implement the new penalties through interim final rulemaking." *Id.*

The Improvements Act first directed agencies across the federal government to make a new one-time "catch-up" adjustment aimed at quickly restoring much of the original value of the federal government's civil penalties. 28 U.S.C. § 2461 note §§ 4(b)(1), 5(b)(2). The cap on this adjustment was set at 150% of the existing penalty amount—a fifteen-fold increase from the 1996 amendment's 10% cap. *Id.* § 5(b)(2)(C). Congress gave agencies a specific deadline for making their catch-up adjustments, directing the promulgation of interim final rules "[n]ot later than July 1, 2016" to "take effect not later than August 1, 2016." *Id.* § 4(a), (b)(1)(B).

The Improvements Act allowed agencies a narrow avenue to impose an initial catch-up adjustment of "less than the otherwise required amount" if, with the concurrence of OMB, the agency determined either that "increasing the civil monetary penalty by the otherwise required amount will have a negative economic impact" or that the "social costs" of the penalty increase would "outweigh the benefits." *Id.* § 4(c)(1)-(2). But this limited exception to the Improvements Act's otherwise mandatory increase was time-limited. Consistent with the directive that agencies make their initial catch-up adjustments "not later than July 1, 2016," *id.* § 4(a), OMB instructed "[a]gencies seeking a reduced catch-up adjustment determination" to submit notices of proposed rulemaking to OMB "as soon as possible, and no later than May 2, 2016." Memorandum from the Director of OMB to Heads of Executive Departments and Agencies, Implementation of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, at 3 (Feb. 24, 2016).

After the initial, mandatory catch-up adjustment, the Improvements Act requires agencies, on an ongoing basis, to update penalties for inflation annually, an improvement over the prior regime's requirement of quadrennial adjustments. 28 U.S.C. § 2461 note § 4(a). The Improvements Act also made several other important legislative fixes. It put in place a new rounding rule (to the nearest $1) that made it far easier for inflation adjustments to clear the rounding threshold. *Id.* § 5(a). And it broadened the scope of the Act by eliminating certain pre-existing exemptions that were in the 1996 amendment. *See id.* § 4(a).

Could Complement These Standards, GAO-07-921, at 23, 29 (GAO Aug. 2007) (noting ongoing concerns about erosion of CAFE penalty's deterrence effect); Congressional Research Service, Adjustment of Civil Monetary Penalties for Inflation at CRS-9 (CRS Feb. 11, 2008) (explaining that "because of rounding rules and other issues, NHTSA has been unable to adjust" the CAFE penalty "for inflation" since 1997).

Administrative Background

Complying with Congress's Command, NHTSA Adjusted the CAFE Civil Penalty from $5.50 to $14

On July 5, 2016, NHTSA issued an interim final rule updating the various civil penalties it administered, including the CAFE penalty. 81 Fed. Reg. 43,524 (July 5, 2016). Although an adjustment to account for the full effect of inflation since the penalty was first established would have increased the penalty to $22, the agency only raised the penalty to $14 to comply with the Improvements Act's 150% statutory cap on any increases.[4] *Id.* at 43,526. The new penalty became effective on August 4, 2016, within days of the statutory deadline. NHTSA did not seek OMB's concurrence to implement a reduced catch-up adjustment.

On August 1, 2016, two automaker associations, the Alliance of Automobile Manufacturers and the Association of Global Automakers, petition NHTSA for partial reconsideration of the penalty increase. The industry petitioners acknowledged that "NHTSA is not empowered to exempt the CAFE program" from the Improvement Act's directive to increase penalties for inflation. *NRDC*, 894 F.3d at 102. They nonetheless sought relief from the newly-increased penalty by arguing that: (1) NHTSA should have imposed a smaller increase by finding that the full increase mandated by the Improvements Act would have a negative economic impact; and (2) NHTSA should not apply the updated penalty rate prior to model year 2019 to accommodate the lead time required to incorporate design and planning decisions.

On December 28, 2016, NHTSA issued a final rule affirming the catch-up increase in the CAFE penalty. 81 Fed. Reg. 95,489 (Dec. 28, 2016) (2016 Civil Penalties Rule). The agency declined to impose a lower catch-up increase based on the industry petitioners' claimed negative economic impact, but it agreed to apply the new penalty only to model year 2019 and later fleets. *Id.* at 95,490-91. NHTSA made this change to avoid retroactively applying the new penalty to model years that were completed, or model years for which industry planning was substantially underway by July 2016 (when NHTSA increased the penalty) and could not readily be changed. *Id.* at 95,491.

The U.S. Court of Appeals Vacated NHTSA's Attempts to Suspend and Repeal the Inflation Adjustment to the CAFE Civil Penalty

Soon after the Trump Administration took office, NHTSA reversed course and began taking actions to forestall, and then roll back, the new $14 penalty rate. On July 12, 2017, NHTSA published a final rule purporting to indefinitely suspend the effective date of the 2016 Civil Penalties Rule while it reconsidered the penalty rate. 82 Fed. Reg. 32,139, 32,139-40 (July 12, 2017) (Suspension Rule). It also claimed to reinstate the $5.50 penalty rate during the pendency of its reconsideration process. 82 Fed. Reg. 32,140, 32,143 (July 12, 2017).

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[4] Thus, the $5.50 penalty represented only 25% of the real value—and the deterrence effect—that the penalty had in 1975.

The States of New York, California, Maryland, and Vermont, the Commonwealth of Pennsylvania, and three environmental public interest organizations filed petitions seeking review of NHTSA's Suspension Rule. On April 23, 2018, the Second Circuit issued an order vacating the Suspension Rule. In the written opinion that followed, the Court held that NHTSA had "exceeded its statutory authority in indefinitely delaying the Civil Penalties Rule." *NRDC*, 894 F.3d at 107-08. The Court emphasized that:

> the Improvements Act is an unusually precise and directive statute [that] mandates that all agencies increase penalties by a date certain with no suggestion of delay.

Id. at 113 n.12. By suspending the penalty increase, the Court held, NHTSA had violated the Act's "*highly circumscribed schedule*" and its "*clear and mandatory*" deadlines, which allow "*no discretion to the agencies regarding the timing of the adjustments*." *Id.* at 109, 113 n.12 (emphasis added and citation omitted). After "nearly 30 years" of "congressional attempts to ensure that civil penalties keep pace with inflation," allowing further delay would "flout the core objects" of the Improvements Act. *Id.* at 110–11 (quotation marks and alterations omitted).

The Court also found that NHTSA violated the Administrative Procedure Act by suspending the inflation adjustment without providing notice of its proposed action and an opportunity for public comment. *Id.* at 113-15. Rejecting NHTSA's attempt to invoke the Administrative Procedure Act's "good cause" exception, the Court explained that an agency preference for "different regulations that are easier or less costly to comply with does not justify dispensing with notice and comment." *Id.* at 115. The Court vacated the Suspension Rule as "unlawful," *id.* at 100, and affirmed that "[t]he Civil Penalties Rule . . . *is now in force*," *id.* at 116 (emphasis added).

More than a year later, and well into the period when model year 2019 vehicles were being sold and when planning for model years 2020 and 2021 was substantially completed (according to industry's claimed need for 18 months lead time), NHTSA issued a new rule entirely eliminating the 2016 inflation adjustment and reinstating the previous—and long outdated—$5.50 penalty amount. 84 Fed. Reg. 36,007 (July 26, 2019) (Repeal Rule). NHTSA advanced a novel argument, contending that the CAFE civil penalty rate was not a "civil monetary penalty" under the Act because the penalty rate was one component required to determine the ultimate penalty paid by a non-complying manufacturer. *Id.* at 36,008. NHTSA's new position was in direct conflict with the plain text of the Act, the agency's decades-long history of making inflation adjustments to the CAFE civil penalty rate, and a longstanding inter-agency consensus that the Act applied.[5] In the alternative, NHTSA asserted that even if the Improvements Act applied, NHTSA would reverse the entire 2016 catch-up adjustment based on the Act's negative economic impact exception. *Id.* at 36,026–29. However, NHTSA previously declined to invoke that exception when it was permitted to do so, *i.e.*, at the time it implemented the catch-up adjustment three years earlier.

[5] *See* note 1, above.

The States of New York, California, Connecticut, Delaware, Illinois, Maine, Maryland, New Jersey, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, the District of Columbia, and two environmental public interest organizations filed petitions seeking review of NHTSA's Repeal Rule. On August 31, 2020, a different Second Circuit panel vacated the Repeal Rule. *New York. v. Nat'l Highway Traffic Safety Admin.*, 974 F.3d 87 (2d Cir. 2020). After closely reviewing the text of the Act and considering the agency's 1997 inflation adjustment of the CAFE penalty rate, the Court rejected NHTSA's new claim that the CAFE civil penalty was not subject to the Improvement Act's mandate. *Id.* at 99-100. The Court also held that the agency "acted in excess of its statutory authority" when it invoked the negative economic impact exception to rescind the catch-up adjustment years after the "limited window of time" had closed for agencies to apply that exception. *Id.* at 101. Once again, the Court affirmed that the 2016 Civil Penalties Rule—and the $14 penalty—were "*now in force*." *Id.* (emphasis added).

Once Again Seeking to Delay Application of the Higher Penalty, NHTSA Issued the Interim Final Rule Repealing the Increase for Model Years 2019–2021

On January 14, 2021, with only one week left in the Trump Administration's term, NHTSA, responding to a petition from the Alliance for Automotive Innovation (Alliance), issued the Interim Final Rule, which purports to repeal the 2016 inflation adjustment for model years 2019–2021, thereby restoring the obsolete $5.50 penalty for two model years that are already completed, and the model year currently underway. The agency claims that this action is needed to avoid the purportedly "retroactive" effect that NHTSA's 2016 catch-up adjustment would have with respect to these model years, that automakers relied on the $5.50 penalty rate when making design and planning decisions, that the reduction is also warranted given the economic impact that the COVID-19 pandemic has inflicted on the auto industry, and that there was "good cause" to rush out this final rule and make it immediately effective without notice and public comment.

For the reasons provided below, the undersigned Attorneys General dispute each of these claims, believe the Interim Final Rule is unlawful and unjustified, and urge NHTSA to rescind the Interim Final Rule and restore the $14 penalty for model years 2019–2021 that was mandated by Congress in 2015 and twice confirmed by the Second Circuit.

Discussion

I. NHTSA Lacked Authority to Repeal the Inflation Adjustment for Model Years 2019–2021

As NHTSA acknowledges, prior to taking its action, it first "had to determine whether it had authority" to do so. 86 Fed. Reg. at 3019. Contrary to its determination that it has such authority, however, NHTSA lacked any statutory authority for its repeal of the 2016 catch-up adjustment for model years 2019–2021. Accordingly, NHTSA's Interim Final Rule is unlawful and should be rescinded.

It is a bedrock principle of administrative law that "an agency may only act within the authority granted to it by statute." *NRDC*, 894 F.3d at 108. This principle reflects the nature of an administrative agency as a "creature of statute" that "has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress." *Michigan v. EPA*, 268 F.3d 1075, 1082 (D.C. Cir. 2001); *see also NRDC v. Abraham*, 355 F.3d 179, 202 (2d Cir. 2004) (same).

In the Interim Final Rule, NHTSA did not identify any statutory provision granting it the power to repeal its 2016 catch-up adjustment for the model years in question. There is no provision in the Inflation Adjustment Act or its amendments—including the Improvements Act—that authorizes an agency to repeal a catch-up adjustment. Nor does EPCA or any other statute contain a provision empowering NHTSA to do this. Absent such a Congressional grant of authority, the Interim Final Rule is in excess of NHTSA's authority.

NHTSA notes that a few agencies, when implementing their catch-up adjustments, specified that the new penalty would apply to violations occurring after certain dates. 86 Fed. Reg. at 3020 n.41. But, unlike here, the dates specified in those instances—November 2, 2015 and August 1, 2016—were consistent with the Improvements Act's requirement that the catch-up adjustments take effect by August 1, 2016. 28 U.S.C. § 2461 note § 4(b)(1)(B). NHTSA also cites its 2016 Civil Penalties Rule, when it made the new penalty applicable beginning with model year 2019. Initially, the undersigned Attorneys General do not concede that NHTSA had authority to take this step, and because no party challenged that action, no court has ruled on its legality. In any event, that action, unlike NHTSA's action here, was aimed at avoiding the retroactive application of the new penalty to *past* violations, *i.e.*, violations that had occurred *prior to* the adjustment. NHTSA concluded that by July 2016, industry planning for model years 2018 and earlier was either completed or so far underway that it would be difficult for a manufacturer to alter its CAFE performance. 81 Fed. Reg. at 95,491. But NHTSA also confirmed that the $14 penalty rate remained in force and applicable beginning with model year 2019. *Id.* Thus, because any violation of the CAFE standards for model years 2019–2021 occurred (or will occur) well *after* NHTSA increased the penalty, there are no retroactivity concerns that would support NHTSA's present action.

NHTSA has identified no precedent for what it has done here: repeal its catch-up adjustment and restore its pre-Improvements Act penalty for violations that indisputably occurred *after* the agency made its catch-up adjustment. Such a result would deliver a windfall to non-complying automakers that were fully aware of the Improvements Act's command to federal agencies, and NHTSA's increase of the CAFE penalty to $14.[6] It also would mean that the mandatory inflation adjustment would be applied beginning with *model year 2022*, *i.e.*, to vehicles sold *more than five years* after the statutory deadline for agencies to make their initial inflation adjustments. Such a delay is not only untethered to any grant of authority found in the

[6] NHTSA's claim that non-complying automakers were justified in relying on its unlawful Suspension and Repeal Rules are addressed in the following section.

text of the Improvements Act, it directly violates the Act's "clear and mandatory" deadlines, *NRDC*, 894 F.3d at 109, and "flout[s] the core objects" of the law, *id.* at 111 (citation omitted).

NHTSA also contends that its general authority to administer the CAFE program under EPCA, and its specific authority to prescribe discretionary increases of the CAFE penalty under 49 U.S.C. § 32912, give it authority to repeal the catch-up adjustment, but the Second Circuit has already rejected both of these arguments when it vacated the Suspension Rule, calling them "meritless." *NRDC*, 894 F.3d at 112. As the Court observed, "[i]n implementing the Improvements Act, Congress articulated purposes that transcended the confines of any given agency's regulatory functions: promoting 'compliance with law' writ large, as well as improving 'collection by the Federal Government of civil monetary penalties.'" *Id.* (quoting 28 U.S.C. § 2461 note § 2(b)). "EPCA does not contravene this government-wide policy. Nor does it confer authority upon NHTSA to delay the penalty as part of its responsibility for administering the fuel economy portions of that statute." *Id.* Just as EPCA did not authorize NHTSA to indefinitely suspend the catch-up adjustment, EPCA does not authorize NHTSA to delay application of the new penalty for three years.[7]

II. Even if NHTSA Had the Authority to Reduce the Penalty, Its Alleged Justifications Are Erroneous

Because NHTSA lacked any express or implied statutory authority to repeal the CAFE penalty's catch-up adjustment for model years 2019–2021, the Interim Final Rule is legally defective, and the justifications NHTSA offers for its action cannot make its unlawful action lawful. But, in any case, NHTSA's purported justifications have no basis in fact.

A. Automakers Had No Legitimate Reliance Interest in the Pre-Improvements Act $5.50 Penalty Rate

Throughout the Interim Final Rule, NHTSA repeatedly refers to "industry's serious reliance interests," alleging, citing the October 2, 2020 Alliance petition, that automakers have "made design, development, and production plans based on the $5.50 rate." 86 Fed. Reg. at 3021. But any such reliance on the $5.50 rate was hardly "reasonable." *Id.* Automakers have known since at least July 2016 that NHTSA had raised the CAFE penalty to $14. 81 Fed. Reg. at 43,526. Indeed, automakers were on notice that the CAFE penalty would increase as early as 2015, when Congress enacted the Improvements Act and directed agencies across the Federal government to implement inflation adjustments to their penalties. Moreover, NHTSA had *already* accommodated industry's need for lead time when, in December 2016, it made the inflation adjustment applicable beginning with model year 2019 in response to a petition jointly

[7] The cases and regulatory statements NHTSA cites in footnotes 26 and 27 do not change this result. They either provide general administrative law principles that are inapplicable to NHTSA's unlawful repeal of the Congressionally-mandated catch-up adjustment, or address wholly different factual situations, such as agency's ability to adjust quotas or exempt *de minimis* violations when not prohibited.

filed by the Alliance's two predecessor organizations. 81 Fed. Reg. at 95,491. Thus, as these industry groups requested, NHTSA gave automakers more than two years to prepare for the increased penalty. Under these circumstances, any automaker's claim that it reasonably relied on the pre-Improvements Act $5.50 civil penalty rate rings hollow.

B. The Second Circuit's Vacatur of NHTSA's Earlier Rules Eliminated any Basis for Reliance on the $5.50 Penalty

NHTSA's unsuccessful attempts to forestall and repeal the inflation adjustment do not provide a valid basis for the Alliance's reliance claims. When the Second Circuit vacated the Suspension and Repeal Rules, the court also eliminated any basis for claimed reliance on those illegal rules. *See e.g.*, *Envtl. Def. v. Leavitt*, 329 F. Supp. 2d 55, 64 (D.C. Cir. 2004); *Nat'l Fuel Gas Supply Corp. v. Fed. Energy Regulatory Comm'n*, 59 F.3d 1281, 1288 (D.C. Cir. 1995). Indeed, the Alliance (through its two predecessor organizations) knew those rules were being challenged and were subject to vacatur given that its predecessor organizations were parties in both actions. For these reasons, NHTSA's claims of unfairness and impropriety based on automakers' reliance interests are misplaced.

It is a basic principle of law that judicial decisions, including vacatur of an illegal regulation, have retroactive effects. *See, e.g.*, *United States v. Sec. Indus. Bank*, 459 U.S. 70, 79 (1982) ("The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student."). When a court vacates a regulation, "the vacatur restores the status quo before the invalid rule took effect and the agency must initiate another rulemaking proceeding if it would seek to confront the problem anew." *Envtl. Def.*, 329 F. Supp. 2d at 64 (internal citations and quotations omitted); *see also Action on Smoking & Health v. Civ. Aero. Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983) ("To vacate . . . means to annul; to cancel or rescind; to declare, to make, or to render, void; to defeat; to deprive of force; to make of no authority or validity; to set aside. Thus, by vacating or rescinding the recessions proposed by [the regulation], the judgment of this court had the effect of reinstating the rules previously in force."); *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 756 (D.C. Cir. 2002) (choosing *not* to vacate because there was no way to restore the "status quo ante"). Only "the most compelling circumstances," such as a "grave disruption or inequity," would allow a court to use reliance as a reason to depart from the "norm of retroactive application" of vacatur. *Nat'l Fuel Gas Supply Corp.*, 59 F.3d at 1288.

If NHTSA or industry had concerns about the effect that vacatur of the Suspension and Repeal Rules—and thus the application of the $14 penalty—would have on industry planning for model years 2019–2021, they could have asked the Court to invoke its equitable discretion and remand to the agency without vacatur. *See NRDC v. EPA*, 808 F.3d 556, 584 (2d Cir. 2015) (when equity demands, remand without vacatur allows agencies to correct legal deficiencies while leaving challenged, unlawful regulations in place); *see also Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993). But they did not do so either time. And the Court indicated its belief that an "apparent way to restore the status quo ante" existed, when, in the course of vacating the Repeal Rule, it affirmed that the $14 penalty was now "in force" beginning with model year 2019. *See Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 97–98 (D.C. Cir. 2002).

C. Application of the $14 CAFE Civil Penalty Rate Does Not Raise Retroactivity Concerns

NHTSA also argues that applying the $14 penalty to any non-compliance that is "temporally impossible to avoid or cannot practically be remedied" would raise "serious retroactivity concerns." 86 Fed. Reg. at 3019–20. NHTSA analogizes its present action to the 2016 Civil Penalties Rule, where the agency made the new penalty applicable beginning with model year 2019. But, as discussed above, this is an inapt comparison because in 2016, NHTSA was concerned about retroactively applying the inflation adjustment to *past* violations, *i.e.*, violations that had already occurred at the time NHTSA made the inflation adjustment. By contrast, NHTSA now seeks to reinstate the obsolete $5.50 penalty for violations occurring *after* NHTSA made the adjustment.

Moreover, NHTSA misrepresents the timeline of the agency's rulemakings, the Second Circuit's decisions, and automakers' alleged lead time needs. NHTSA maintains that, in August 2020, when the Second Circuit vacated the Repeal Rule and affirmed the $14 civil penalty rate, "industry plans for what remains of model year 2020 and model year 2021 were 'fixed and inalterable,'" meaning it was "too late" to avoid non-compliance. 86 Fed. Reg. at 3021 (quoting 81 Fed. Reg. at 95,490). But according to automakers' claims that they generally require 18 months of lead time, plans for model years 2020 and 2021 should have been "fixed" in mid-2018 and mid-2019, respectively—when the $14 civil penalty rate was "in force." *See NRDC*, 894 F.3d at 116. Indeed, when NHTSA issued the Repeal Rule in July 2019, it explicitly confirmed that, due to the Second Circuit's vacatur of the Suspension Rule more than one year earlier, the $14 penalty would apply to model year 2019 in the absence of further agency action. 84 Fed. Reg. at 36,012 ("Absent this final rule … the rate would have increased beginning with model year 2019 for noncompliances that will likely be determined in approximately late 2020."). And even if an automaker chose to proceed based on speculation about the outcome of NHTSA's rulemaking process and predictions about the subsequent litigation, that was a bet it made with full awareness of the potential consequences.

While NHTSA focuses exclusively on the purported interests of automakers that erroneously relied upon its illegal Suspension and Repeal Rules as grounds not to comply with the CAFE standards, NHTSA entirely ignores the reliance interests of automakers that properly based their compliance decisions for model years 2019–2021 on a correct understanding of the penalty rate mandated by the Improvements Act. Indeed, the inflation-adjusted $14 penalty better incentivized automakers to comply with the standards, but, due to the CAFE program's design, it also incentivized them to go further and design their fleets to be even more fuel efficient than the standards require in order to earn valuable credits. Yet as NHTSA admits, the agency's action will decrease the value of those credits, *see* 86 Fed. Reg. at 3021, thereby retroactively harming the automakers that made economic decisions in reliance on the $14 penalty rate.

In short, enforcing the inflation-adjusted $14 penalty rate beginning with model year 2019 would not "punish[] violators retroactively." 86 Fed. Reg. at 3019. Automakers had ample time to prepare their production plans in response to the increased rate. Instead, NHTSA's repeal of the $14 penalty rate for model years 2019–2021 will punish those automakers that performed as Congress intended by taking steps to ensure they met—or exceeded—the CAFE standards for the model years in question.

D. The Economic Impact from the COVID-19 Pandemic Does Not Justify Repealing the 2016 Catch-Up Adjustment

NHTSA next contends that the economic effects of the COVID-19 pandemic on the automobile industry support its action. The undersigned Attorneys General recognize the widespread economic harm that the pandemic has inflicted on millions of Americans in our States and across the entire country. It is the rare business or industry that has not been seriously affected by the pandemic. But, as explained above, it is up to Congress, not NHTSA, to consider reducing the penalty based on economic considerations. *New York*, 974 F.3d at 100-01 (holding that NHTSA lacked any authority to "reconsider the economic effects of the increase it had already promulgated in 2016").

Moreover, NHTSA failed to consider—or even solicit—information that mitigates its claims. Although vehicle sales declined substantially during the second and third quarters of 2020, by the fourth quarter many automakers saw sales rebound to pre-pandemic levels, and analysts forecast that the industry will continue to see strong growth in 2021.[8] Meanwhile, NHTSA's assessment of manufacturer compliance for model year 2020 is just getting underway, and penalties for that model year will not be finalized until later this year (if not next year). Penalties for model year 2021 will not be determined until late 2022 or even 2023.[9] Thus, it is likely that the worst economic effects of the pandemic will have faded before non-complying automakers have to pay penalties for the model years in question. Moreover, automakers have various compliance strategies available to them to avoid penalties, including the use of credits from other fleets or past model years, the availability of anticipated credits from upcoming model years, and the purchase of credits from other manufacturers.

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[8] Car and Driver, "New Car Sales See Mixed Finish in December After Tumultuous Year" (Jan. 5, 2021), available at https://www.caranddriver.com/news/a35130259/new-car-sales-end-2020-announced/; CNBC, "With a lot of optimism and vaccine hopes, U.S. auto sales could increase by as much as 10% in 2021" (Jan. 14, 2021), available at https://www.cnbc.com/2021/01/14/with-a-lot-of-optimism-and-vaccine-hopes-us-auto-sales-could-increase-as-much-as-10percent-in-2021.html.

[9] There typically is a substantial lag between the end of a model year and the time a non-complying automaker pays a penalty. For instance, penalties for model year 2017—the most recent model year for which penalty information is available—were announced in late 2019.

III. The Interim Final Rule Violates the Administrative Procedure Act

Finally, by promulgating the Interim Final Rule without notice and comment, NHTSA violated the Administrative Procedure Act. Under that statute, before promulgating a rule an agency must publish "[g]eneral notice of proposed rule making ... in the Federal Register," as well as "an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553. "These requirements apply with the same force when an agency seeks to delay or repeal a previously promulgated final rule." *NRDC*, 894 F.3d at 113; *see Clean Air Council v. EPA*, 862 F.3d 1, 9 (2017) (confirming that an agency normally "may not alter [a legislative] rule without notice and comment").

NHTSA claims that "good cause" existed for issuing the Interim Final Rule without notice and comment. 86 Fed. Reg. at 3023. But the good cause exception "should be narrowly construed and only reluctantly countenanced." *Abraham*, 355 F.3d at 204. It is generally limited to "emergency situations, or where delay could result in serious harm." *Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004) (internal citations omitted). None of the grounds advanced by NHTSA support the use of the Administrative Procedure Act's "good cause" exception here.

NHTSA first contends that because "manufacturers have a compelling need for ample advance notice of an increase to the CAFE civil penalty rate," "further delaying a decision on when the rate should be adjusted" by allowing the notice and comment normally required under the Administrative Procedure Act was "impracticable." 86 Fed. Reg. at 3023. This is an insufficient basis to justify invoking the "good cause" exception. Use of impracticality as the basis for forgoing notice and comment "is generally confined to emergency situations in which a rule would respond to an immediate threat to safety, such as to air travel, or when immediate implementation of a rule might directly impact public safety." *NRDC*, 894 F.3d at 114; *see also Mack Trucks v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012) (collecting cases). Here, NHTSA did not identify any emergency situation justifying NHTSA's decision to skip notice and comment.

NHTSA's impracticality claim also makes no sense. Contrary to NHTSA's claims, the Interim Final Rule did *not* notify automakers of an "*increase* to the CAFE civil penalty rate." 86 Fed. Reg. at 3023 (emphasis added). NHTSA provided that notice over four years ago, and the Second Circuit subsequently confirmed the increase on two different occasions. Rather, the Interim Final Rule *decreased* the CAFE civil penalty rate. Moreover, as NHTSA states, it did so with respect to two model years that already "are complete" and one model year that "is underway" and for which industry planning is largely finished.[10] *Id.* NHTSA does not explain why automakers required "ample advance notice" for model years where planning is done or largely done. With respect to model years that automakers presumably *are* planning now,

[10] To the extent NHTSA believed it needed to effectuate the penalty decrease quickly in order to assess penalties for model year 2019, it did not base its "good cause" claim on that need. In any case, such a need would not constitute the type of "emergency situation" required to forgo notice and comment.

namely model years 2022 and 2023, the Interim Final Rule left the $14 penalty unchanged. [11] Thus, providing notice and allowing public comment would not have impacted industry at all.

NHTSA next contends that public comment was "unnecessary," but use of this justification "is confined to those situations in which the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public." *Mack Trucks*, 682 F.3d at 94 (quotation marks omitted). NHTSA's repeal of the catch-up adjustment for three model years is not in any way "routine," and the Interim Final Rule clearly evinces NHTSA's view that its action is consequential to industry and the public. *See, e.g.*, 86 Fed. Reg. at 3023 ("Applying the adjustment to the CAFE civil penalty beginning in model year 2019 will result in serious harm … and could very well inhibit economic recovery"); *id.* (NHTSA stating that "this rulemaking is 'economically significant,' as the Agency believes that the difference in the amount of penalties received by the government as a result of this rule … are likely to exceed $100 million in at least one of the years affected by this rulemaking").

Finally, NHTSA claims that, owing to the COVID-19 pandemic, it was in the public interest to forgo notice and comment. This claim is unfounded. NHTSA identifies no harm that would have resulted by providing the public with notice and an opportunity to comment. As the Second Circuit explained when it rejected NHTSA's prior attempt to invoke this exception:

> Notice and comment are not mere formalities. They are basic to our system of administrative law. They serve the public interest by providing a forum for the robust debate of competing and frequently complicated policy considerations having far-reaching implications and, in so doing, foster reasoned decisionmaking.

NRDC, 894 F.3d at 115. NHTSA's decision to rush out the Interim Final Rule without notice and comment proves this point. By depriving the public of the opportunity to consider and debate NHTSA's proposed action before it became final, the agency deprived itself of the opportunity to correct course. As a result, far from being an exemplar of reasoned decisionmaking, the Interim Final Rule is legally, factually, and procedurally flawed.[12]

Conclusion

For the reasons set forth above, the undersigned Attorneys General urge NHTSA to rescind the Interim Final Rule and restore the inflation-adjusted $14 penalty for model years 2019–2021 that the agency adopted in 2016 in accordance with the Improvements Act, and that was twice affirmed by the Second Circuit.

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[11] For all the reasons provided above, the undersigned Attorneys General object to NHTSA's suggestion that it also may repeal the $14 penalty for model year 2022.

[12] For the same reasons that NHTSA's attempt to use the "good cause" exception is unjustified, NHTSA's attempt to justify the Interim Final Rule's immediate effective date pursuant to 5 U.S.C. § 553(d)(3) and 5 U.S.C. § 808(2) is also erroneous.

Respectfully submitted,

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